No. 92-957

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GERALD J. GARNER,

Petitioner,

—v.—

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

MARVIN E. FRANKEL
(*Counsel of Record*)
KRAMER, LEVIN, NAFTALIS,
NESSEN, KAMIN & FRANKEL
919 Third Avenue
New York, New York 10022
(212) 715-9100

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1. Respondent suggests (Br. in Opp. 4-5) that the repeated refusal of the single prosecution witness to answer cross-examination questions is of no consequence because the case against petitioner was provable without calling the witness. The argument, even if it correctly reflected the record, would be no basis for avoiding the due process question stated

in both the petition and the brief in opposition (p. 1). It is surely not the law that cross-examination may be denied on the contention that the party seeking it would lose in any event. Moreover, the contention is wrong on its face, as the Referee himself recognized.

As shown in the petition, the cross-examination questions the witness refused to answer went, as the Referee said (Tr. 126-27), to "the principal question" in the proceedings. There is no suggestion that the long series of questions the witness was allowed to reject (Pet. 9-10) were outside the scope of the direct testimony. The Referee's observation reflected an awareness that the alleged grievance against petitioner, understood in the context petitioner's counsel sought to develop, could have been proved baseless or at a minimum too trivial to warrant a serious sanction had the blocked lines of inquiry been pursued.

There is no weight in the further suggestion (Br. in Opp. 5) that petitioner's counsel could have had his cross-examination questions answered if he had made "a formal request to the OCC, as Respondent did, for whatever testimony he deemed relevant to his case." It is at best an anomaly to require that a party should "request" in advance the testimony to be adduced on cross-examination of a hostile witness. If anything could be said for the idea, it cannot serve to obviate the undisputed fact that the petitioner's cross-examination was blocked by the witness's permitted refusals to answer.

2. Repeating the position successfully pressed in the New York courts, respondent says (Br. in Opp. 6):

> Under the doctrine of sovereign immunity and as a general rule of Federal Law, Federal Agencies and their employees are not subject to state court subpoena power.

That unqualified proposition, considered with the three cases cited to support it, underscores the aptness of this case for the granting of certiorari.[1]

Respondent invokes *Touhy* v. *Ragen*, 340 U.S. 462 (1951), which petitioner has urged as an authority that is distended by the decision in this case; properly understood, in light of succeeding precedents, *Touhy* helps to demonstrate the conflict with the governing principles this Court has declared. In *Touhy* a subordinate official of the United States Department of Justice, obeying a regulation of the Attorney General, refused to produce departmental papers. When it sustained that position, this Court noted the provision in the regulation that the material could "be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed." 340 U.S. at 466. Because "no such limited disclosure was requested" and the demand for production was "without limitation", this Court held that the witness "was not guilty of contempt unless the law required the witness to make unlimited production." *Id.* In that setting, because the law imposed no such unbounded requirement, there was no occasion to consider "[t]he constitutionality of the Attorney General's exercise of a determinative power as to whether or on what conditions or subject to what disadvantages to the

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[1] Two of the three citations are to district court decisions quashing discovery subpoenas to federal agencies in pending "state" (District of Columbia) actions and relying upon sovereign immunity, *inter alia*, as grounds of decision. *Sharon Lease Oil Co.* v. *F.E.R.C.*, 691 F. Supp. 381 (D.D.C. 1988); *Environmental Enterprises, Inc.* v. *U.S. E.P.A.*, 664 F. Supp. 585 (D.D.C. 1987). Among the several reasons the cases are not useful bases for opposing certiorari is the distinction between those discovery subpoenas and the subpoena herein to aid in cross-examining the federal employee appearing voluntarily as a witness.

Government he may refuse to produce government papers under his charge . . . ." *Id.* at 469.[2]

The question thus left open, and shown by this Court's decisions in the intervening forty years to require an answer rejecting any such "determinative power," is presented in this case. The Referee, sustained by the New York appellate courts, accepted as decisive and controlling the agency employee's defiance of the subpoena. Even the use of the word "compliance" in a question was declared, in a governing jest, to be "a naughty term" (Tr. 112). When asked to look at a withheld document to aid in the inquiry as to its availability, the Referee would not do even that, declining "to inspect anything that has not been offered and admitted in evidence" (Tr. 82-83).

The "determinative power" unexamined in *Touhy* has been denied repeatedly in rulings by this Court on various claims of executive and cognate privilege since 1951. Those decisions, reviewed in the petition (pp. 17-18), show that the ultimate decision is for the court, not the executive officer, upon a suitable appraisal of the withheld materials to balance the need for the evidence against the interest in confidentiality. The abdication of this judicial responsibility in this case is particularly objectionable when the controlling power was asserted not by a department or agency head but by another subordinate agency employee, the "counterpart" of the witness, who "instructed [him] that [he] was to ignore the subpoena" (Tr. 106), referring to some "agreement" that was never shown to exist and was flatly denied, without further question, by responsible counsel (Tr. 86, 107).

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[2] In a concurring opinion, Justice Frankfurter observed that the decision in *Boske* v. *Comingore*, 177 U.S. 459 (1900), held controlling by the Court in *Touhy*, contained "not a hint . . . that the Government can shut off an appropriate judicial demand for . . . papers."

Finally, this reply must lay to rest a misstatement of the facts. Having opened the subject of the subpoena with its sweeping assertion of "sovereign immunity and . . . Federal law" making state court subpoenas unenforceable against federal employees (Br. in Opp. 6), respondent ends by asserting a "position that the OCC did comply with Petitioner's subpoena" (*id.* at 7). That position is unfounded. As shown by unquestioned and unquestionable references to the record, the employee neither purported to nor did comply with the subpoena, specifying documents he had not produced, including the one the employee brought but the Referee refused to look at (Tr. 82-83, 106-108, 113, 115, 139).

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider a summary remand for consideration of the stated questions raised but not explicitly treated by the New York appellate courts.

Respectfully submitted,

Marvin E. Frankel
(Counsel of Record)
Kramer, Levin, Naftalis,
Nessen, Kamin & Frankel
919 Third Avenue
New York, N. Y. 10022
(212) 715-9100

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